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STARE DECISIS.

In most English text books on jurisprudence, 'judicial decisions', 'precedents', or 'adjudications' are recognized as one of the 'sources of law,' although analytic jurists have attempted to maintain that it is the duty of judges to abstain from 'making' law and their proper function is only to ascertain it. All are however agreed that in so determining the law, judges are to a large extent tied down by the opinions of their predecessors, and where such opinions have been held for a long time and consistently enforced, it is held to be the duty of the judge to give effect to them, even if his own individual judgment is at variance with them. This rule is known by the familiar name of *stare decisis*, *i.e.*, to *stand by the decisions* in previous cases. The principle has attained such an established position in English jurisprudence as well as in the law of all other countries whose system of law was originally derived from, or is now guided and directed by England, that it is likely to appear to the ordinary lawyer as a principle of universal jurisprudence. This is however far from being the case. On the other hand, the generally accepted view in the continental legal systems is that judicial decisions have no constraining effect. Professor T. E. Holland in his Elements of Jurisprudence observes, "The continental view is an inheritance from the law of Rome; for although Cicero enumerates 'res judicatae' among the sources of law, and the Emperor Severus gave binding force to the 'auctoritas rerum perpetuo similitar judicatarum' the contrary principle was finally established by a constitution of Justinian. The Codes of Prussia and Austria expressly provide that judgments shall not have the force of law, and although the Codes of France, Italy and Belgium are silent on the point, the rule in all these countries is substantially the same, *i.e.*, that previous decisions are instructive,

but not authoritative, subject to certain special provisions of a strictly limited scope"; and even in England the rule of *stare decisis* was not recognized in the earliest times. Custom was the authoritative guide in England when Roman law formed the rule of law in other countries. From the time of Edward I at least however, when the year books came into existence, decisions were referred to as evidence of custom, but they were not authoritative. Gradually however their influence increased, and the patent of James I for the appointment of official reporters recited "that the common law of England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time and that the doubts and questions likewise which arise upon the exposition of statute laws are by the same means cleared and ruled," and by the time that Blackstone wrote his commentaries, precedents had come to be recognised as having a binding force in analogous cases. See Blackstone's Commentaries, Vol. 1, pp. 68 to 72. The rule may be said to have held its place ever after in English law, see *The King* v. *The Inhabitants of St. Mary Lambeth,* 8 T. R., 239 per *Lord Kenyon, C. J, The King* v. *The Inhabitants of St. Paul, Deptford,* 13 East, 321, per *Grose, J, Mirehouse* v. *Bennel,* 8 Bing. 557, per *Tindal C. J,* although many a strong judge like Sir George Jessel has strained the leash and vigorous attempts have sometimes been made to narrow its scope. The House of Lords however in *Caledonian Railway Co.* v. *Walker's Trustees,* L.R., 7 App. Cas, 275 held that its own decisions were binding upon it, until the law was altered by the legislature. See also *Beamish v. Beamish,* 9 H. L. Cas, 274, 338, *Attorney-General* v. *Dean and Canons of Windsor,* 8 H. L. Cas, 391, per *Lord Campbell.* It is doubtful how far the decisions of subordinate tribunals are binding upon such tribunals themselves where there has been no pronouncement on the question in dispute by the highest tribunal. The point was raised in the Court of Appeal in *Hadfield's case,* L. R, 8 C P, 306 and the opinions of the court are of importance as showing that according to some judges at least even the House of Lords is not absolutely bound by its own decisions. *Bovill, C.J.,* observed at p. 313, "I should be sorry to lay it down as a rule that this court cannot depart from a previous decision, especially where it can be shown that there has been an omission to cite an earlier authority, or a clear mistake in

its application; and I do not concede that we are absolutely bound to adhere to our decisions in the same manner as the House of Lords considers itself bound. There is no parallel between the two cases. The decisions of the House of Lords as the supreme court and court of ultimate appeal, are decisions upon the law not pronounced simply by lawyers, but by the whole House of Peers; for it is only in modern times that they are pronounced by a select number of the members of the House. The law seems, from the cases referred to, to be clearly settled that decisions of the Lords are final and binding on the House itself in future cases. That principle however has never been applied to the superior Courts of Westminster in cases where they have a peculiar jurisdiction; for instance, in the Queen's Bench on appeals from quarter sessions, in the Exchequer in matters of revenue, and in this court on appeals under the Registration Acts, and in matters arising under the Railway and Canal Traffic Act. Whenever a new jurisdiction is given to the courts, some time must necessarily elapse before the law can be settled; and great inconvenience and mischief would result in such cases, where there is no appeal, if the courts were absolutely bound by their decisions, though manifestly erroneous. I, therefore, hold that we are fully at liberty to reconsider any decision which may have been come to upon these Acts of Parliament, and do not consider that we are at all concluded by the case of *Heelis* v. *Blain*, 18 C. B, (N. S), 90." *Brett, J.* (now *Lord Esher*) went even further and said, "I doubt very much whether if it were shown clearly that a former decision proceeded upon erroneous principles, it would not be competent to the House (*i. e.* the House of Lords) in another case to reconsider the matter. But, be that as it may, I think this court is bound to administer the law as it exists at the time when the particular judgment is delivered. I abide by what I said in *Orme's case*, L. R. 8 C. P, 281, *viz.*, that this court is bound to adhere loyally to former decisions unless clearly satisfied that they are wrong. But if we are satisfied that a former decision is clearly wrong, and not warranted by law, we ought not blindly to follow it, and I am satisfied that the court has acted upon that principle on more than one occasion." *Grove, J.* agreed in this view. It will be observed that *Brett, J.* questions the absolute binding effect of a decision of the House of Lords, and that while *Bovill, C. J.* admits

it, he puts it entirely upon historical reasons. On general principles there appears to be no distinction between the applicability of the rule to the House of Lords and the Courts of West-minster, where there is no appeal under the law from the decisions of the latter courts; and on the whole it may be said that the rule of *stare decisis* is not now treated with the same absolute reverence in England as it was some years ago, while on the other hand, it is treated with more deference than in the past in the continental countries. * Professor Holland observes, "There have of late been symptoms of an approximation between the two theories. While on the continent judicial decisions are reported with more care and cited with more effect than formerly, indications are not wanting that in England and the United States they are beginning to be somewhat more freely criticised than has hitherto been usual." In our opinion this approximation is a very desirable consummation. It is not, we think, possible, on principle or on grounds of expediency, to justify a rigid rule of *stare decisis*. The fundamental rule is to decide rightly, and though there can be no doubt that what is right and expedient will in many cases largely depend upon what has been enunciated as the law by the courts of the country in the past, there must be many cases where regard for precedents cannot justify the perpetuation of an erroneous decision. The fact is that the weight to be attached to the rule depends on the nature of the question in dispute and many other circumstances greatly varying in individual cases. We shall now see whether a few general rules may not be enunciated on which the application of the rule may be made to depend. For this purpose it is well to remind ourselves of the true basis of the rule. As we have already said, the aim of the court should always be to decide rightly and justly. But right and justice depend largely in many cases upon the satisfaction of the reasonable expectations of men. Hence, even if abstractly speaking, previous decisions may seem to contravene the dictates of utility and of justice, it will often do less harm to abide by them than to upset men's notions derived from past decisions. As neatly expressed in Broom's Legal Maxims the object of the rule is "where the same points come again in litigation, as well to keep the scale of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps

indifferent, is now become a permanent rule which it is not in the breast of every subsequent judge to alter or swerve from according to his private sentiments," in other words, the necessity for consistency, certainty, and uniformity, is the ratio of the principle. We may add that the reason of the rule is also in part to maintain confidence in the constituted tribunals and to preserve their dignity and respect, see *Mirehouse* v. *Bennell*, 1 Cl. & Fin., p. 546. These are very necessary to do justice between man and man, but the rule in question may be so absurd that it will do less harm to depart from it at once than to perpetuate it. Broom observes, "The judicial rule *stare decisis* does however admit of exceptions, where the former determination is most ardently contrary to reason."

1. Where the law on any matter is determined by statute and the courts have only to construe the statute, the rule will have less force than in other cases, where the law has not been codified but depends upon custom, the common law or rules of jurisprudence. To understand and to correctly apply these must always be a matter of more or less difficulty on account of their comparative indefiniteness, and it is therefore advisable that definiteness and uniformity should be secured by means of judicial decisions even at some expense of abstract ethical perfection, but there must be stronger reasons to justify a departure from the correct construction of a statute for the sake of adherence to precedent; when the language is obscure, it will no doubt be safe to abide by decisions and leave it to the legislature to correct the interpretation if erroneous; but if the language is plain we submit that it is the bounden duty of the court to follow it notwithstanding the opinions held in former cases.

2. Again the extent to which the principle may be allowed to prevail over the judge's notions of what is the correct law on the matter will depend in some measure on the nature and activity of the legislative machinery of the country. Where the latter is active and easily moved, the courts may rightly stick to their own pronounced opinions until corrected by the legislature. But where it is slow, inefficient, complex or hard to influence, the courts will feel it incumbent on themselves to review and reconsider their decisions to bring it as far as possible into harmony with the principles of jurisprudence and the demands of justice.

3. Again, where the rule by its very nature cannot be abstractly perfect, but must in a more or less degree be arbitrary, the rule of *stare decisis* ought to be strictly followed, for change in such cases, though it may help towards the attainment of a more perfect rule in some degree, does considerably more harm on account of the disturbance it causes. To take an illustration from Blackstone, "It has been determined time out of mind that a brother of the half-blood shall never succeed as heir to the estate of his half-brother, but it shall rather escheat to the king or other superior lord." The same thing may be said of all rules relating to inheritance. These are to a considerable extent arbitrary in the law of all countries, and to permit judges to change an arbitrary law will often result in great confusion.

4. The weight to be attached to the principle will moreover always depend on the number of decisions that have accumulated and the length of time that they cover. If they have been followed so long and so often that the knowledge of them has had time to permeate the people at large and induce them to act in the faith that they lay down the law of the land, much weightier reasons would be necessary to disturb them than if the knowledge of them has been confined to professional lawyers. In *Lozon* v. *Pryce*, 4 Myl & Cr, p. 617, *Lord Cottenham* observed, "In matters which do not affect existing rights or properties to any great degree, but tend principally to influence the future transactions of mankind, it is generally more important that the rule of law should be settled than that it should be theoretically correct; but when the question deeply affects the existing rights and interests of a large portion of the community; and the decisions impeached cannot to any great extent have influenced the subsequent arrangements of parties affected by them—for such I conceive must be the case in the present instance—the object of reverting to the right rule is so great and the inconvenience likely to arise from making the attempt comparatively so small that a judge ought not to be deterred from it. Still his discretion might be regulated by the weight of the authorities to which his opinion is opposed and the length of time during which the opposite rule has appeared to be established."

5. Further, the rule has very little force when the effect of the decisions is negative, to make some transaction invalid, or to bar the legal recognition of some right or custom. Suppose for instance

a contract of a particular nature, has been for a long time regarded by the courts as contrary to public policy, but owing to more correct conceptions, there is a change in the opinions of the judges and they are inclined to regard them as unexceptionable. In such a case we think the rule of *stare decisis* should not stand in the way of the adoption of the correct view on the subject. There are no expectations of people who acted on the old view to be disappointed. Many may have abstained from entering into such contracts on account of the prior decisions, but they cannot be injured by the contracts of others who acted differently being respected. On the other hand, the court should be slow in condemning contracts hitherto treated as valid, for to do so would be to disturb rights created under transactions which the parties entering into them had a right to expect would be treated as valid. Take again the case of a custom not recognised by prior decisions. If notwithstanding the view taken by the courts, people go on recognising them, it shows their consciousness that it is a binding usage and respect for precedents does not require that the custom should again be disregarded.

6. The cases which call for the strictest application of the principle are those, where (1) the validity of a contract, or conveyance, or other transaction resulting from a contract is in question, (2) the construction of a contract, a grant, or a will is in dispute. We have already referred to some instances of the former class. It is equally applicable where the capacity of the contracting parties, or the requisite of *consensus ad idem* or any other requisite to the validity of a contract or the rights created by them are in question. Contract is such a common and indispensable requirement of social life that the rules regulating it should be as definite as possible, and fluctuation on the part of the courts is likely to occasion great and frequent mischief. Similar observations obviously apply with regard to the meanings to be put upon words in instruments. People naturally and rightly expect the court to place the same construction on similar words in other instruments; and except where it is obvious that a wrong construction has not become known to those who draw up documents or has not influenced them we think that the safest course on the part of the courts would be to abide by the meaning that has already been put on the words in question.

7. But even in the case of contracts, where the question is what is the right measure of the damages to be awarded to the party whose rights are infiringed, the rule, it is submitted, has no application. A person who has broken a contract has no right to say that he did so in the belief that larger damages would not be awarded than has been done in previous cases, for precedents cannot justify his breach and he cannot therefore plead them in extenuation of his conduct, nor again can one be permitted to say that he is entitled to larger damages than he has actually sustained, because other persons have been improperly awarded them before.

8. In the law of delicts, including torts as well as crimes, the principle of *stare decisis* is of far less applicability. Where an act is wrong in itself or *malum in se* according to the moral notions of the community, one who transgresses the moral law cannot claim that his acts should not be punished by the courts, on the ground that similar acts were not punished before. Treating of the question of *mens rea* the court of Queen's Bench laid down a similar rule in *Regina* v. *Prince,* L. R, 2 Cr. Cases, 154, and held that a prisoner who seduces a girl cannot escape by proving that he did not know that the girl was under sixteen, if in fact she is under that age. In the converse class of cases also where an act has been wrongly regarded as tortious or criminal, there is no reason for adhering to the view when the court is convinced of the error of its view.

9. But where the tort or crime is purely the creature of positive law, where it is not *malum in se,* but only *malum prohibitum* for financial or other reasons, the case is more analogous to contracts and persons who have acted on the faith of the precedents of courts ought not to be punished without strong grounds for doing so. The rule will not however apply, as already pointed out, to cases where an act has been erroneously treated as a tort or as a crime.

10. Here again, where the question is regarding the amount of damages, or the severity of the punishment to be inflicted on a wrong-doer, the court is very much at liberty to do what it regards as right.

12. In offences like bigamy, &c., which savour of contracts, precedents would be entitled to far more respect than in the case of crimes generally.

13. Similar remarks will apply to cases where a tort consists of the breach of duties respecting property or animals, especially where they partake of the nature of insurance, as the duty to do nothing on one's own land except using it in the modes ordinarily recognised by law, so as to injure another, to take care of wild animals at the peril of paying for all injuries that they may do to others.

14. In adjective law, uniformity of procedure and definiteness are of especial importance, and the rule of *stare decisis* may therefore be applied with great advantage. When the question is one of evidence, if it relates to the mode of proving facts which are relevant to the case, or the manner in which witnesses are to be examined, the rule would advantageously be applied, but where the dispute is whether certain facts are relevant or not, we think it has no application. It has nothing to do with the satisfaction of reasonable expectations, and correctness is more desirable in such cases than adherence to precedent.

We have attempted to indicate briefly a few general principles that may guide the courts in the application of a rule not always rightly understood. We are ready to admit that fuller consideration may show that the principles as stated by us are not quite accurate; we have attempted to enunciate them only in the hope that it will stimulate thought on a question that is of considerable importance at the present time.

SECTION 99 OF THE TRANSFER OF PROPERTY ACT.

One of the most conspicuous among the many instances of legislative bungling to be found in the Transfer of Property Act is the provision in S. 99 which forbids a mortgagee from bringing the equity of redemption to sale except by a suit for sale in respect of the mortgage-debt. A mortgagee who has claims for money against the mortgagor besides the subject of the mortgage, must realize them, as best he may, out of the properties of the debtor other than those mortgaged. If such other properties are not sufficient, he may attach the equity of redemption in the mortgaged properties, but cannot proceed to sale of it. He must wait till his right to bring the mortgaged properties to sale for the mortgage

debt accrues and may, after the mortgaged properties have been sold, obtain satisfaction of his money-claims out of the surplus sale proceeds. It may happen that the mortgage money is not payable until after several years, and the mortgagee will have to content himself with merely placing an infructuous attachment on the equity of redemption. Why a mortgagee should be placed in a worse position than other creditors in respect of claims not based on the mortgage, it is not easy to discover. No such provision is to be found in the English law, and there was no such rule in this country prior to the Transfer of Property Act. We have therefore to see what the circumstances were which induced the legislature to adopt such a singular rule. In the Report of the Indian Law Commissioners, of 1879, (p. 35), it is stated that there was a common practice on the part of mortgagees of suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property, and then enforcing the security against innocent purchasers who were unaware of its existence and were thus defrauded. The practice referred to by the Commissioners was, if it existed, checked by the action of the different High Courts. When a creditor under a bond by which property was mortgaged took a money-decree and proceeded to attach and sell the mortgaged property in execution of it, two questions arose, one relating to the retention of his lien by the mortgagee and the other to his competency to bring a separate suit to enforce such lien against the purchaser. The leading case upon the subject is *Syud Emam Momtazooddeen Mahomed* v. *Rajcoomar Dass*, 14 B. L. R, 408, decided by a Full Bench of the Calcutta High Court. It was held in this case that where a creditor took a money-decree in respect of his mortgage debt and sold the mortgaged property in execution of it, the purchaser acquired not merely the equity of redemption of the mortgagor, but also the benefit of the creditors' lien and that if there was no third party interested in the property, it became vested absolutely in the purchaser. It was pointed out by *Sir Richard Couch, C. J.*, that there was no warrant for holding that when a sale was under a decree for sale, it conveyed the rights of both creditor and debtor, but that when it was in execution of a simple money-decree the right of the debtor only. Whether the decree do, or do not direct the sale of the mortgaged property,

the mortgagee when he puts up the property or sale, sells the entire interest that he and the mortgagor could jointly sell. Even in the case of a mortgage decree, an order for sale cannot conclude persons who claim an interest in the property, if they are not parties to the suit. The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor to the purchaser of the mortgaged property, but to obtain satisfaction out of the security passed. It would therefore be anomalous to hold that when the security is sold to satisfy a money-decree obtained upon the mortgage, it is sold subject to the mortgagee's right to sell it again, or, in other words, that the mortgagee has the right to sell the same property twice for the same debt. It is also obvious that there is very great danger of unjust depreciation when a property is sold to satisfy a debt subject to a right to sell again for the same debt. When the equity of redemption is sold by a stranger in execution of a decree against the mortgagor, the property is sold subject to a definite incumbrance and may fetch an adequate price. But when the equity of redemption is sold subject to a lien for the mortgage debt itself, the value of the property is liable to be injuriously affected by the uncertainty of the extent of the lien. Another reason in favour of the view that the whole property and not merely the equity of redemption passes to the purchaser is that mentioned by *Sir Richard Garth, C. J,* in *Bhuggobutty Dossee* v. *Shamachurn Bose*, I. L. R, 1 C, 337, 353, that a contrary view would deprive the mortgagor of the privilege which upon the principle of considering the estate as a pledge, a court of equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. Yet another argument in favour of this view is furnished by the inequitableness of holding that the purchaser of the equity of redemption is incompetent to set up the mortgage as a shield against subsequent incumbrancers even when the sale proceeds have been sufficient to discharge the mortgage and have discharged it. The view taken by the Calcutta High Court has been adopted by the High Courts of Madras and Bombay, *Ramu Naikan* v. *Subbaraya Mudali*, 7 M. H. C. R., 229 and *Narsidas Jitram* v. *G. Joglekar*, I. L. R, 4 B, 57, and dissented from by the High Court of Allahabad, *Khub Chand* v. *Kalian Das*, I. L. R, 1 A, 240, 246.

Upon the second point *viz.*, whether supposing the equity of redemption alone to be sold, the mortgagee can enforce his lien against the purchaser, the Calcutta High Court held that a mortgagee is not competent to bring a separate suit for this purpose, 14 B. L. R, 408. Even the Allahabad High Court is inclined to hold, that unless the mortgagee gives notice at the sale of his intention to retain the lien, it should be held that he had waived it. The practice referred to by the commissioners was thus checked by the action of the courts by holding that the equity of redemption could not be sold separately to satisfy the mortgage debt and that the mortgagee could not subsequently enforce his lien by a separate suit against the purchaser. What was needed to be done by the legislature was merey a statutory enactment of those two rules. The draft bill submitted by the commissioners contained a section (98) corresponding to S. 99 of the Act under the heading of abandonment of security by the mortgagee selling mortgaged property. The terms of the section were, "Where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage, or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, he shall be deemed to have abandoned his security thereon, unless before the issue of the proclamation under the Code of Civil Procedure, S. 287, he gives notice of such security to the court executing the decree." The draft section is an unsatisfactory compromise between the views of the Calcutta High Court and the Allahabad High Court, *Sir Charles Turner*, who delivered the leading judgment in the Allahabad case, being a member of the Law Commission. Where a mortgagee sells in execution of a decree for the satisfaction of a claim under the mortgage, the presumption of abandonment of security in the absence of notice to the contrary is reasonable and in accordance with previous decisions. But where the mortgagee sells in execution of a decree for the satisfaction of a claim not arising under the mortgage, there is no reason why he should be deemed to have abandoned his security. The only reason that can be suggested for the rule is that, when a mortgagee sells the mortgaged property, intending purchasers are likely to be misled into the belief that he himself has no incumbrances on the property. The hardship, if any, which might arise from extending the presumption of abandonment to this

case was however obviated by allowing the presumption to be rebutted by the mortgagee by giving notice of reservation of his lien. Notwithstanding some defects, the draft section was on the whole innocuous and even useful. But the same thing cannot be said of the provisions of S. 99 in the Act. What induced the legislature to alter the wording of the draft section, we have not been able to ascertain. The marginal note in the draft, *viz.*, abandonment of security by the mortgagee selling the mortgaged property gave place to the words "attachment of mortgaged property" and the section itself runs as follows, "Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under S. 67 and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, S. 43."

The evils introduced by the section are far worse than the one which was intended to be remedied. It is now open to a mortgagee to sue for a money-decree upon his mortgage, execute his decree against the mortgagor personally, and if there is any balance still due to him, bring another suit for sale of the mortgaged properties, which he could not have done formerly. This encouragement of a multiplicity of suits is itself an evil; but a more serious objection to the section is that a mortgagee is disabled from selling the equity of redemption in execution of decrees on claims not connected with the mortgage. He will have to attach the equity of redemption and sit with folded hands, till he can sue for a sale upon the mortgage. If this period of waiting should exceed 12 years from the date of the decree, the decree would become barred notwithstanding the decree-holder's diligence. Again other attachments may be made by other creditors during this interval and the mortgagee deprived of the benefit of his diligence by being obliged to accept rateable distribution with them. If the mortgage is a pure usufructuary mortgage and the mortgagee has no right to bring the property to sale, how is his claim to be enforced? Does S. 99 apply in such a case to stay the mortgagee's hands or not? The prohibitory words of the section "he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67,"

seem to us to presuppose the possibility of a suit for sale under that section and therefore not to apply to a case where that section excludes a suit for sale. It is not clear whether this consideration was present to the minds of the judges in *Durgayya* v. *Anantha,* I. L. R, 14 M, 74. The decision in *Vigneswara* v. *Bapayya,* I. L. R, 16 M, 436 that the prohibition in S. 99 is applicable to cases of pure usufructuary mortgage with no covenant for repayment of mortgage money appears to us, with all deference to the learned judges, to be clearly unsound. The reasoning of the learned judges is that the suit contemplated by S. 99 is not by a usufructuary mortgagee as such which is prohibited by S.67, but by a decree-holder who also happens to be a mortgagee. But we fail to see how the holding of a money decree can confer upon a usufructuary mortgagee a right to bring a suit for sale of the mortgage property, where as a usufructuary mortgagee he would have no such right under S.67. A usufructuary mortgagee as such has no right to sue for sale, and the holder of a money-decree as such is equally disentitled to bring a suit for sale. A combination of the two characters must therefore be equally incapable of conferring a right to sue for sale. It is suggested by the Calcutta High Court in *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry,* I. L. R, 20 C, 34 that the suit contemplated by S. 99 is a suit on the charge created by the attachment. Such a suit cannot be maintained and, even if it can be, it will serve no purpose, see our remarks in 4 M. L. J, p. 61. Where a person holds two mortgages on the same property and in execution of a decree directing a sale on the second mortgage attempts to bring the mortgaged property to sale, it might be be urged that he could not do so except by a suit for sale on the other mortgage. But this contention cannot prevail, as the use of the word *attaches* in the section shows that it is not applicable to mortgage-decrees under which it is unnecessary for the decree-holder to effect an attachment. It may also be pointed out that though the suit for sale contemplated by section 99 must be a mortgage suit, it need not be on some particular mortgage. The requirement in the section will therefore be satisfied by a suit on the second mortgage; see *Dinendra Nath Sanyal* v. *Chandra Kishore Munshi,* I. L. R, 12 C, 436.

Where a mortgagee obtains a decree for sale of the mortgaged premises in respect of an instalment of the mortgage-money or the

interest, S. 99 would, for the reason just mentioned, offer no obstacle to a sale of the premises. But the sale would, we conceive, be free of any lien for the remainder of the debt or principal, as such remainder or principal would be a part of the same debt, and would not constitute a prior incumbrance. It would be both inconvenient and anamalous to allow a creditor to sell a piece of property for a portion of a debt subject to a lieu for the remainder.

We have already confessed our inability to find any satisfactory reason for a rule which places the mortgagee in a worse position than other creditors merely because he is a mortgagee. It is possible that the hobgoblin of fear of oppression of the mortgagor by the mortgagee may have operated upon the mind of the legislature and induced it to enact such a rule. The fact that this consideration is not noticed by the Law Commissioners in their report shews that they did not attach any importance to it. Even if the reason we have conjectured be well founded, we do not think the proper remedy is to punish a mortgagee by throwing obstacles in the way of his obtaining satisfaction of his other claims.

The fact that a mortgagor owes other debts to the mortgagee besides the subject of the mortgage cannot always be put down as the result of a scheme on the part of the mortgagee to oppress the mortgagor and deprive him of his property. Even a thoroughly honest and well-meaning mortgagee may find himself in such a situation, and it would be unjust to deprive him of the ordinary remedies of creditors. Whether a mortgagee who is under the disability imposed by the section can evade it by transferring his claims to a stranger and whether such transferee can sell the equity of redemption in execution of decrees for the satisfaction of such claims is not judicially settled. On the one hand it may be contended that the object of the section would be frustrated by permitting such an evasion, and on the other hand it may be urged that a section, which restricts ordinary rights, like S. 99 ought not to be extended to cases not strictly covered by the language of the section. The latter view seems to have received the countenance of the judges in *Sami* v. *Krishnasami*, I. L. R., 10 M, 169. We have pointed out the various inconveniences and difficulties which attend the working of this section and we trust we have demonstrated the necessity for an early amendment of the section.

Section 99 ought to be repealed at the earliest opportunity and in its stead might be substituted a provision that a mortgagee who sells the mortgaged premises in execution of a decree based on the mortgage shall be deemed to sell the mortgage interest also.

NOTES OF INDIAN CASES.

Narayanasami Naidu v. Narayana Rau, I. L. R, 17 M, 62. We note with pleasure the inclination of the courts to substitute common sense for loyalty to convention in the interpretation of agreements to pay enhanced interest from the date of a bond in case of default in payment at the stipulated time The judgment of the Allahabad High Court in *Banke Behari* v. *Sundar Lal*, I. L. R, 15 A, 232 clearly points out the absolute inapplicability of the doctrine of penalties to such cases, and we are glad that *Muthusami Aiyar* and *Best, J.J*, recognise in the case under notice that the only correct rule in such cases is the well known one of finding out and enforcing the real intention of the parties. It is nearly half a century since the legislature realised the economic blunder of attempting to put down usury by legislation, but the courts have been trying to punish usurers by artificial rules of construction which were not designed to ascertain the intention of parties to a contract but to condemn certain contracts which did not commend themselves to judges.

Sattappa Chetti v. Jogi Soorappa, I. L. R, 17 M, 67. It is well established that when a plaint or any judicial proceeding is amended it becomes a part of the original plaint or proceeding and dates back to the date of the original plaint. This being the general rule, S. 22 of the Limitation Act expressly provides that with regard to one class of amendments, *i.e.*, the addition of a new plaintiff or defendant, the suit shall be deemed to have been instituted so far as the plaintiff or defendant so added is concerned only when the amendment is made. The spirit in which the power to grant leave to amend should be exercised is well pointed out in *Tildesley* v. *Harper*, L. R, 10 Ch. D., 393 and in *Kurtz* v. *Spencer*, L. R, 36 Ch. D., 770. The function of the courts as observed by an eminent judge is not to enforce discipline but to administer justice. Where therefore an error which requires to be rectified was due to a *bona fide* mistake, or rather as put by *Bramwell, L. J*, where there is no *mala fides*, amendment ought to be permitted At the same time care should be taken that the opposite party is not prejudiced by the amendment. He would therefore be usually entitled to all costs incurred before the date of amendment. But there has been some confusion as to the exact scope of the principle that the

opposite party should not be prejudiced by the amendment. In *Weldon* v *Neal*, L. R, 19 Q. B. D, 395, *Lord Esher, M. R.*, says, "We must act on the settled rule of practice which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments," and *Lindley* and *Lopes, L. J. J.* concurred in the same opinion. On the other hand in *Mohummud Zuhoor Ali Khan* v *Mussumat Thakooranee Rutta Keor* 11 M. I. A. at p. 485, *Sir J. W. Colville* delivering the judgment on behalf of the Judicial Committee said, in discussing the question whether an amendment ought to be granted in the case, "considering however that such a suit (*i.e.*, a new suit which the plaintiff in the case might institute) would probably be met by the Statute of Limitations, that in the circumstances of this case such a defence would be inequitable.. ..... they have come to the conclusion that the fairer course is to do what the judge in the court of first instance might, under the Code of Civil Procedure have done at an earlier stage of the course, namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of the money due on the bond." Thus in the opinion of the Privy Council, the circumstance that a fresh suit might be barred by limitation instead of being an argument against the granting of an amendment, was a good reason why it should be granted. We submit that this is the more correct rule. All that the party likely to be affected by an amendment can claim is that he should be put in the same position as if the plaint or other proceeding had been correctly framed in the beginning. He cannot be permitted, we submit, to say that he should be in a better position than he would be if his opponent had not made a mistake. The very object of amendment is to allow the erring party to correct his mistake; and to allow his antagonist to claim the advantages of the mistake, seems to be against the very principle of amendments. The learned judges of the court of appeal base their judgment to some extent upon the "settled practice of the English courts." The courts in India are of course not bound by the English practice. We cannot therefore say that we are glad that *Muthusami Aiyar* and *Best, J.J.* followed the ruling in *Weldon* v. *Neal*, 19 Q. B. D., 395.

Samia Pillai *v.* **Chockalinga Chettiar,** I. L. R, 17 M, 76. Can there be an action or any other legal proceeding against a dead man? The answer probably that most lawyers would give is 'Decidely not'. But the decision under notice is against this view. *Muthusami Aiyar* and *Best, J.J.* held that an application for execution against a deceased judgment-debtor was sufficient within the meaning of Art. 179 of the Limitation Act to give a fresh starting point for execution, that an application against a dead person is 'one in accordance with law.' Does the

law allow an application against a dead person? According to the court of appeal, a proceeding against a dead individual has no more life than the individual himself and *Kay, L. J*, points out the error of supposing that there is some shadowy apparition to be pursued in such cases, *Duke* v. *Davis*, 1893, 2 Q. B, 260. The stringency of the law of limitation however has naturally induced our courts to hold many applications to be sufficiently in accordance with law for the purpose of saving limitation which are by reason of some defect incapable of being proceeded with by the courts.

Kassim Saib v. **Luis**, I. L. R, 17 M, 82. We think *Muthusami Aiyar* and *Best, J. J.* have put too narrow a construction upon the provisions of S. 583. A claims the rent of certain property. C also claims it. A sues B the tenant for rent and C is made a co-defendant. The first court dismisses A's suit, but the second court grants him a decree. B does not appeal against the decree for rent, but C does, and the whole suit is dismissed. After the decision of the second court, A has received the rent in execution. The learned judges hold that B cannot recover it back in execution. S. 583 applies where a "party is entitled to any benefit *under* a decree passed in an appeal." Their lordships say there is no decree in B's favor, because B did not appeal. But is not a decree dismising the suit *in toto* a decree in B's favor, and is not B entitled *under* the decree to a return of the money? The expression '*under* the decree' seems to us merely to mean 'in consequence of the decree.' B's right to restitution of the amount is surely consequential upon the decree, and we can see nothing in the language of S. 583 to warrant the interpretation that the decree must have been passed at the instance of the party claiming restitution.

Venkatalingam *v.* **Veerasami,** I. L. R, 17 M, 89. Following the ordinary rule of interpretation that a word should be understood in the same sense in the same statute, it would seem to be right to hold that the word *sale* in Art. 138 of the Limitation Act means the actual sale itself and not the sale confirmed, see *Kishori Mohun Roy Chawdhry* v. *Chunder Nath Pal*, I. L. R, 14 C, 644. But we cannot understand why the legislature should have enacted that while a purchaser cannot sue for possession until the sale is confirmed (S. 316, Civil Procedure Code), limitation runs before it is confirmed. It is quite possible, though it may not be probable, that the confirmation may not take place for 12 years after the sale, and the result in such cases would be that the suit would be barred before it could be legally instituted. When such a case arises, we suspect the decision in the case will not be adhered to, notwithstanding the rule of interpretation relied on by *Muthusami Aiyar* and *Best, J. J.*

Ramasami v. Sami, I. L. R, 17 M, 96. The Madras High Court has at last begun to take a sensible view of the effect of failure to execute a decree for redemption by paying up the amount due and recovering possession of the mortgaged property. An order under S. 93 is not necessary to bar the right of redemption, although a different view was strongly expressed by *Muthusami Aiyar, J.* We do not know how far *Collins, C. J.* and *Davies, J.* were influenced by the insertion of a clause in the decree barring the right of redemption in case of non-payment of the mortgage amount into court within the time fixed. We have shown in our article on the subject, see 2 M. L. J. 387 that the omission of the clause is really not material.

Kathiawar Trading Company v. Virchand Dipchand, I. L. R., 18 B., 119. *Sargent, C. J.* and *Bayley*, J. have done a good deal to clear away one cause of confusion with regard to the meaning of S. 10 of the Limitation Act. They point out that in this country unlike England, the rule embodied in S. 10 will apply only where the legal estate is vested in the defendant and will not embrace cases where the duties of the defendant are of a fiduciary character as those of the directors of a company to the shareholders. The question was discussed in *Kherodimoney Dossee v Doosyamoney, Dorsee* I. L. R., 4 C., 455, and *Markby, J.* was inclined to put a wider construction upon the word 'vest' than has been adopted by the Bombay High Court though the learned judge recognised the fact that S. 10 ought not to extend to all cases of fiduciary relationship, such as agents, partners, benamidars.

Another important question was decided in the case under notice. The learned judges held that a claim against the directors of a company to recover money which had been applied by the directors for objects beyond the scope of the company, could not be enforced for staleness, nearly a quarter of a century having elasped since the illegal appropriation of the money. At first sight the application of the rule against stale claims so as to protect persons standing in a fiduciary relation seems to require explanation. But the decision proceeds on the ground that the defendant would be materially prejudiced by the enforcement of the claim after such delay as other directors who were equally responsible with him were dead. Is this sufficient to justify the denial of a relief to which by law a party is entitled against the surviving partner? Perhaps it may be said that the long delay would be strong evidence of acquiescence on the part of the shareholders in the directors' act, or it might be taken as amounting to a waiver of their claims against the directors.

In India where the historical distinction between legal and equitable rights does not exist it may be doubted whether mere staleness can ever be a valid defence to a legal right, except where the delay may be taken to amount to waiver or acquiescence.

Janakibai v. Mahadev, I. L. R, 18 B, 147 This is certainly an extreme application of the rule that in construing sale certificates under the Civil Procedure Code, the court may look beyond the certificate itself and examine the nature of the debt to ascertain what was really intended to be sold. A Hindu dies; his brothers are sued as his representatives and a decree is passed against his estate only, and his right, title, and interest in certain property were sold and yet the Bombay High Court holds that what was intended to be sold was not A's right, title, and interest, but the rights of his brothers in the property. Why? Because the deceased man's interest was nil, and the plain construction of the certificate would work injury to the purchaser. But the decree too was expressly against the dead man's estate only although the parties on record were his brothers. Every circumstance in the case increases the difficulty of upholding the construction of the learned judges. Verily 'Hard cases make bad law.'

Chamela Kuar v. Amir Khan, I. L. R, 16 A, 77. Section540 of the Civil Procedure provides Code amongst other things that the appeal shall....be accompanied by a copy of the decree appealed against, and (unless the appellate court dispenses therewith)of the judgment on which it is found. The section lays down several other requisites for an appeal and the imperative mood is used with reference to them all. Now what would be the result, if one of these is not fulfilled; would the presentation of the appeal be void according to law, or is it merely irregular, capable of being rectified? *Mr. Justice Burkitt* is of opinion that a memorandum of appeal unaccompanied by a copy of the decree appealed against is not a good memorandum. The learned judge rests his decision on two prior cases of the Allahabad Court both unreported. He does not consider whether the ruling will apply where the defect does not relate to the production of the decree, but is due to the nonfulfilment of some other requisite referred to in the section. We are not altogether satisfied that the conclusion arrived by the learned judge is inevitable. There is no irrefragable reason why the absence of an enclosure should fatally affect the validity of the memorandum. We think the courts will be slow to hold that if the grounds of appeal are not concisely written, or other requirements of S. 540 are not strictly followed, the presentation is to be deemed invalid. There is apparently

no good reason for placing one of the requirements on a different footing from the others.

Basa Mal v. Tajammal Husain, I. L. R., 16 A, 78. We fail to see how the omission of a mortgagee who has obtained a decree for the sale of the mortgaged property to put in his claim to the Collector under the Land Acquisition Act can deprive him of the right to proceed against the compensation awarded under the Act which becomes the substitute for the original security. There is no provision in Act X of 1870 which deprives the party guilty of an omission to put forward claims under S. 90 of the Act of his rights to the fund awarded under the Act. All that can be reasonably held appears to be that he cannot afterwards be permitted to urge his claims under the Act.

In the matter of the petition of Mathura Das, I. L. R, 16 A, 80. *Aikman, J* agrees with the Madras and Calcutta Courts that under S. 439 the High Court has power to revise an order passed by a lower court under S. 476 of the Criminal Procedure Code. The learned judge does not regard *Queen Empress* v. *Narakka*, I. L. R, 13 M, 144 as an authority to the contrary. He regards that case only as laying down that in such cases the High Court has no powers of interference under S. 195 of the Criminal Procedure Code.

Queen Empress v Durga, I. L. R, 16 A., 84. The indulgence of the English Criminal law often leads to the most fanciful notions regarding the duty of public prosecutors; many a judge imagines that the prosecutor's duty is to do all he can to prove the innocence of the accused. The judgment of the Full Bench of the Allahabad High Court in the case under notice has relieved public prosecutors from liability to be charged with not examining witnesses called for the Crown at the preliminary inquiry but whom the prosecutor has reason to believe to be perjured. He is not bound to put forward their perjured testimony in order that his case may be discredited. The accused are at liberty to do that.

Queen Empress v. Moss, I. L. R, 16 A, 88. During the course of the protracted trial of the Himalayan Bank frauds case, *Edge, C. J.* had to decide several questions of considerable importance. It is necessary to draw attention to only one of them. We think it is to be regretted that the learned judge took the responsibility of deciding as a single judge that the word 'compelled' in S. 132 of the Evidence Act refers only to a case where the court has compelled a witness to answer a question, and not to a case where the witness has not asked to be excused from answering a question, but gives his answer without any claim to

have himself excused. We have fully dealt with the question on a former occasion, see 2 M. L. J., p. 209, and we think it would have been better if the learned judges had reserved the point for the decision of the whole court.

Dakhina Mohan Roy *v.* Saroda Mohan Roy, I. L. R, 21 C, 142. The decision in this case is somewhat anomalous. But we have no doubt that it will be regarded as eminently just. Their Lordships of the Privy Council say, when a *bona fide* holder of proprty pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. The claim is considered as in the nature of salvage. We have nothing to add by way of criticism of this case to what has been said by Mr. Sivaswami Aiyar in his article entitled "Dealings with property by trespassers" at page 183 of 2 M. L. J. The position of the holder unsuccesful in the court of last resort is not regarded by their lordships as that of a trespasser, for the courts below recognized him as legally entitled to the estate, and the payments which were made during the time of such legal holding of the estate were in consequence recoverable from the rightful representative. This again is not in accordance with strict legal conceptions, for the decree of the highest court declaring the person in possession not entitled must relate back to the time of the first accrual of the possession and make the holder of the estate a trespasser in strict legal parlance. However as we have already indicated, there is no virtue in inflexible legal rules, if they do not subserve the ends of justice. It would be manifestly against our sense of common justice, if because of some difference between two constituted tribunals on some obscure question of law, the fair, *bona fide*, and business-like conduct, of a man borrowing for the preservation of the estate in dispute were to lead him and the person lending into pecuniary difficulties.

Ghasitli *v.* Umrao Jan, I. L. R, 21C, 149. We are glad that the Privy Council have declined to countenance an attempt to create a new rule of succession for a Mahomedan prostitute under the pretence of adoption transferring the prostitute to a new family. The system of single and double adoptions sanctioned by the Madras High Court for Hindu prostitutes is not, we think, likely to find much favour with that tribunal, Referring to *Mathura Naikin* v. *Esu Naikin*, I. L. R, 4 B, 545, their lordships well observe, " But even in the case of Hindus great difficulties have been felt by courts of justice in admitting the validity

of transactions *intended for the furtherance of prostitution*" though disguised under the name of adoptions.

Mahomed Riasat Ali *v.* **Hasin Banu,** I. L. R, 21 C, 157, When the subsequent suit is based upon a different cause of action, even understanding the phrase in the extended sense given to it in S. 43, that section is no bar to the suit. A suit by a Mahomedan widow as heir of her husband for movables against the husband's brother is not a suit for specific movables under Art. 49 or for a distributive share under Art. 123 but one falling within Art 120. Notwithstanding the generality of the language of Art. 49, their Lordships think that Art. 49 is not applicable to a suit to establish a right to inherit the property of a deceased person.

Dhunput Singh *v.* **Paresh Nath Singh,** I. L. R, 21 C, 180. We agree with *Petheram, C. J.* and *Ghose, J.* that the permission under S. 30, Civil Procedure Code, need not be express or at all events, when there is a substantial compliance with the provisions of S. 30 as to notice &c., and the court has acted as if such permission had been granted, that the suit may be dealt with as instituted on behalf of all interested. See also *The Secretary of State for India* v. *Mathurabai*, I. L. R, 14 B, 213 and *Ramayyangar* v. *Krishnayyangar*, I. L. R, 10 M, 185. The words "having the same interest" are construed to mean "similarly interested in suing."

Udai Chunder Churkerbutty *v.* **Ashutosh Das Mozumdar,** I. L. R, 21 C, 190. A Hindu widow is under a pious obligation to discharge her husband's debts out of his assets though the debts are time-barred. When an alienation is made for the purpose of discharging such debts there is a sufficient legal necessity to justify the alienation. See Mayne's Hindu Law, S. 587, where the conflict of decisions is referred to.

Clark *v.* **Alexander,** I. L. R, 21 C, 200. *Sale, J.* appears to us to overlook the language of S 295, Civil Procedure Code, which refers to more persons than one having prior to realization applied to the court by which assets are held. The obvious meaning is that to entitle to rateable distribution under S. 195, application should have been made to the same court. There is no other section in the Code, which authorizes rateable distribution. S. 285 simply points out the court which shall realize the assets and settle claims. Where there are attaching creditors of different courts, it does not empower rateable distribution to be made, S. 295 being the only section dealing with the question we think

the Madras and Bombay High Courts are right in *Muttalagiri* v. *Muttayyar*, I. L. R, 6 M, 357 and *Nimbaji Tulsiram* v. *Vadia Venkati*, I. L. R. 16 B, 683. We also think that the Calcutta cases referred to by *Sale, J*, do not support him.

Nil Madhub Sarkar *v.* **Brojo Nath Singha,** I. L. R, 21 C, 236 The rule of *res judicata* enacted in S. 13, Civil Procedure Code, has not ceased to perplex the legal mind. A suit for rent in which a plea that defendant was not in possession of a portion of the estate was raised was decreed, the plea being held not proved. A second suit for rent for a subsequent period was instituted and the same plea was raised. The judges hold that this was not *res judicata*. We respectfully differ. The plea was not that since the last suit, the defendant had gone out of possession but that the defendant had never been in possession. This we think was inadmissible. The learned judges say that if evidence had been gone into and after contest it had been decided that the plaintiff was in possession the rule of *res judicata* would apply. But we can see no distinction where the courts rejects the plea on the ground that the defendant on whom the onus lay failed to discharge it. The cases cited *Bussun Lall Shookul* v. *Chundee Dass*, I. L. R, 4 C, 686 and *Nobo Doorga Dossee* v. *Foyebur Chowdhrg*, I. L. R, 1 C, 202 seem quite in point.

NOTES OF ENGLISH CASES.

In re **Somerset. Somerset** *v.* **Earl Poulett,** 1894, 1 Ch, 231. Where trustees commit an innocent breach of trust by investing money on mortgage of property of insufficient value and continue paying the interest received from the mortgagor to the beneficiary, such payment cannot operate as an acknowledgment by the trustees of a liability to repay the principal or of a breach of trust so as to save limitation.

Martin *v.* **Price,** 1894. 1 Ch, 276. Where a plaintiff proved his legal right to ancient lights, a substantial obstruction of the same by the defendant and the likelihood of further infringement, it was held that in the absence of special circumstances, he was entitled to an injunction to restrain further infringement and that the fact that the commercial value of the premises or the facility of letting them had not been affected was no reason for refusing an injunction.

Hole *v.* **Chard Union,** 1894, 1 Ch, 293. A continuing cause of action is a cause of action which arises from the continuous repetition of acts or omissions of the same kind as that for which the action is brought. Where in an action for an injunction and damages in respect of a nuisance caused by the pollution of a stream by the discharge of

sewage and refuse into it, the court awarded an injunction and ordered an inquiry as to damages, held that the damages were rightly assessed so as to cover damages caused by the continuance of the nuisance after the date of the injunction, as such continuance amounted to a continuing cause of action within the meaning of order XXXVI, rule 58.

In re **Bridger, Brompton Hospital for Consumption** *v.* **Lewis**, 1894, 1 Ch, 297. An extension whether by a statute or otherwise, of a testators' power of disposition in the interval between the making of his will and his death does not alter the meaning of his language. although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to.

In re **Lord Sudeley and Baines & Co.,** 1894, 1 Ch, 334. Where a power of sale of property is given by a settlement by deed or will, it is a question of intention whether the power should be exercised after the estate in fee simple has vested in possession. Where a power of sale is conferred for the purpose of dividing the property among the persons entitled, it is not obnoxious to the rule against perpetuities and may be exercised within a reasonable time after the life estates have come to an end.

Piddocke *v.* **Burt**, 1894, 1 Ch, 343. A partner who receives money belonging to the partnership on account of himself and his co-partner does not receive it in a fiduciary capacity.

J. & P. Coats *v.* **Chadwick,** 1894, 1 Ch, 347. In an action for infringement of a trademark, the plaintiff is at liberty to warn the trade against infringement or imitation during the pendency of the action, but any public discussion of the merits of the case will constitute contempt of court.

Partridge *v.* **Partridge,** 1894, 1 Ch. 351. Where a will provided that if any person who under the limitations of the will should come into possession of the rents of the estate, should refuse or neglect to reside in and occupy the mansion-house during nine months in the year, the interest of such persons should cease, held that an infant was not bound by the condition, as an infant has no power to choose his own place of residence.

Stretton's Derby Brewery Company *v.* **Mayor of Derby,** 1894, 1 Ch, 431. When under and by virtue of statutory duties and powers, works are made and maintained by a public body for the benefit of the public or of a section of the public, and a member of the public, in

exercise of the statutory rights given to him uses those works and suffers damage, the rights of that member and the liability of the public body in respect of such damage are to be ascertained not by considering how matters would stand if the parties could be regarded as strangers, but by reference only to the statutes under which the works were made, maintained and enjoyed.

Pape v. Westacott, 1894, 1 Q. B, 272. There is no authority for an agent employed to receive money to take any thing but cash unless it is in accordance with the ordinary course of business to receive a cheque. If an agent is merely to collect money, taking a cheque from a person having a banking account is not a departure from his authority. Where a lease provided that the lessee should not assign the premises without the lessor's written permission and the defendant, a house-agent, is employed by the lessor to hand over a written licence to assign to the lessee upon receipt of the rent in arrear, but the defendant delivers the licence on receipt of a cheque in his favour for the rent and other moneys which is afterwards dishonoured, he exceeded his authority, his duty having been to receive payment in cash, and was therefore liable to pay damages, and the measure of damage was the amount of the arrears, as the lessee was unable to pay and the incoming tenant could not be pursued for it.

Sutton & Co., v. Grey, 1894, 1 Q B, 285. The plaintiffs stock-brokers, entered into an oral agreement with the defendant, that he should introduce clients to them and the plaintiffs should transact business on the Stock Exchange for them on the terms that defendant should have half the profit or loss on such transactions The plaintiffs sued the defendant for half the loss in respect of transactions on behalf of a client introduced by the defendant. Held, that the action was maintainable though the contract was not in writing as it did not fall within S. 4 of the Statute of Frauds.

Per Lord Esher, M R :—" The test given is whether the defendant is interested in the transaction either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee. If he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and S. 4 does not apply."

James v. Jones, 1894, 1 Q. B, 304. Baking powder is not an article of food and the mixing with it of an ingredient which renders it injurious to health is not an offence under S. 3 of the Sale of Food and Drugs Act, 1875.

Gozzett v. Maldon Urban Sanitary Authority, 1894, 1 Q. B 327. Where the urban sanitary authority had made a bye-law requiring a person laying out a new street exceeding 100 ft. in length to make it not less than 36 ft. in width, and the appellant, a lessee of a piece of ground together with a right of way over the adjoining road which was 15 ft, wide, for a distance of more than 100 ft. commenced to build two houses on the ground of which he was lessee but did not widen the road over which he had a right of way to 36 ft, held that what the appelant had done did not amount to laying out the road as a new street, and he was therefore not liable to the penalty prescribed.

Thompson v. Mayor. &c. of Brighton. Oliver v Local Board of Horsham, 1894, 1 Q. B, 332. When the urban sanitary authority having as such the property and the management of the sewers and the streets inserted in one of the sewers a man-hole the cover of which was in the highway but was properly made and in good repair. The road having been allowed to wear away so that the cover projected above the surface of the road, the plaintiff's horse stumbled over it and was injured. Held reversing *Kent* v. *Worthing Local Beard*, 10 Q. B. D, 118, that the only breach of duty which could be imputed to the defendants was their omission to repair the highway for which no action would lie.

Per A. L. Smith, L. J:—It is now beyond doubt the law that where a person though lawfully using a highway is damaged either as regards himself, his horse or his carriage, merely by reason of the non-repair of the highway he has no action at law for damages against any one. His sole remedy is by indictment against the parish which has made default or for penalties under S. 94 of the Highway Act against the surveyor.

Brett v. Monarch Investment Building Society, 1894, 1 Q. B, 367. The rules of a Building Society provided in the case of depositors who had given notice of withdrawal, that "if the available balance in hand shall be at any time insufficient to pay all the depositors wishing to withdraw, they shall be paid in rotation according to the priority of their notices." A depositor who gave notice not having been repaid, *held* by the majority of the Court of Appeal that the fact that the available balance was insufficient to pay the depositors who had given prior notice to withdraw was an answer to the action.

Shaw v. Great Western Railway, Co., 1894, I Q. B, 373. Section 7 of the Railway and Canal Traffic Act, enacts that a Railway Company shall be liable in the absence of a signed and reasonable contract for

exemption, for the loss of any goods in the receiving, forwarding, or delivering thereof, "occasioned by the neglect or default of such company or its servants." Held that loss of goods by theft of the company's servant without negligence on their part was not a loss "occasioned by the neglect or default of the Company or its servants" within the meaning of S. 7. The Company could therefore protect themselves under the common law, against liability by a special contract though the contract was not reasonable as required by the Act.

Attorney General *v.* **Metropolitan Railway Co.**, 1894, 1 Q. B, 384. A Railway Company authorized by Statute to construct an underground railway had a tunnel for purpose of ventilation near plaintiff's house. By the enlargement of the tunnel the quantity of smoke and foul air coming near the plaintiff's house was increased and the house became much depreciated in value. In an action for compensation held that, whether the alteration was in the exercise of rights as owners of the land or under the statute, the plaintiff was not entitled to compensation as the damage arose not from the construction but from the working of the Railway.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications :—

The Canada Law Journal for March (*in exchange*).

The Canadian Law Times for March (*in exchange*).

The Green Bag for March (*in exchange*).

The Western Law Times for March (*in exchanqe*).

The American Law Review for March (*in exchange*).

The Harvard Law Review for March (*in exchange*).

Suitors in person in Crown Cases:—There is said to be a rule of court that a writ of *mandamus* can be moved for only by counsel, and that an applicant in person has no right of audience. The rule was to some extent approved by *Mr. Justice Cave* and *Mr. Justice Wrigyt* against a suitor in person who wanted a *mandamus* to the justices of Brentford, we believe, with respect to their refusal to grant him process against Sir M. E. Grant-Duff for offences numerous and various, alleged to have been committed by him when Governor of Madras, and with respect to which, if they exist outside the imagination of the applicant, magistrates have jurisdiction in England under the Acts relating to

offences by public officials abroad—*viz*, 11 Wm. III, Ch. 12, and 42 Geo. III, Ch. 85. (See *Regina* v. *Eyre*, 27 Law J, Rep, M. C, 159; L. R, 3 Q. B. D, 487). The suitor had his remedy by bill of indictment or application for leave to file a criminal information; but he preferred, as we have said, the high prerogative writ of mandamus. If he had applied for a rule under S. 5 of the Justices Protection Act, 1848, (11 & 12 Vict., Ch. 44), it appears to be settled law that he need not instruct counsel *Regina* v. *Biron*, 51 L. T, 429; but in the result the judges, though they declined to hear him argue in support of his application, read his affidavits and refused the *mandamus*.—*Law Journal*

Can a Governor be impeached for improperly exercising the pardoning power?—Mr. George H. Shibley, of Chicago, has an article in the *Green Bag* for October, which is certainly not written "in lighter vein," under the heading, "The Pardoning of the Anarchists: Is Governor Altgeld liable to impeachment?" Governor Altgeld, it will be remembered pardoned the anarchists,—those of them that were not hanged but imprisoned instead in the penitentiary, not on the general ground that he found their case proper for the exercise of executive clemency, but on the ground that they had been *illegally convicted.* Now, as the Supreme Court of Illionis had affirmed the conviction, the publication of such reasons for granting the pardon was an impudent and indecent assertion of his right and power to review a decision of the Supreme Court. But the conclusion of Mr. Shibley does not follow from this fact. That conclusion is that the Governor, in exercising his pardoning power on that ground, has committed an official misdemeanor, and is therefore liable to impeachment. The proposition will not bear any analysis at all. The Governor of a State can no more be impeached for giving lawful, or foolish, or impudent, or disgraceful reasons for doing a wrongful act, than a judge can be impeached for giving similar reasons for rendering a lawful decision * * * *—*American Law Review.*

Excluding from the court room parties who may become witnesses:—The *Law Journal* (London) comments upon the recent action of *Mr. Justice Grantham* in excluding all parties who were to be called as witnesses in their own behalf from the court-room until their own evidence had been given. The learned justice also indicated that, on some future occasion, he might follow the practice which prevails in Scotland, and exclude *medical experts* from the court-room while their scientific brethren were in the witness-box. The *Law Journal* refers to it as an innovation; and while it admits the discretionary power of the court to make such an order, it takes the view that it is a power which ought to be exercised with the greatest caution, since its exercise deprives a

party to a suit of the right to make suggestions to his legal advisers as the trial develops. It may be observed that there are decisions in the United States to the effect that the judge cannot properly put *a party to the suit* "under the rule," as it is called. 1 Thomp. Trials, S. 279; *Chester* v. *Bower*, 55 Cal, 46; *Ryan* v. *Couch*, 66 Ala, 244, 248. It has on the same principle, been held that the *agent of a party* whose office it is to conduct the litigation of his principal, cannot be properly so excluded, *Ryan* v. *Couch*. On the question of excluding *medical experts*, there is no doubt that it is wholly a matter within the discretion of the trial court, and that it is a power which ought to be exercised more frequently than it is. There is, however, a holding to the effect that, when medical experts are called, solely as such, the better practice is to allow them to remain in court and hear the testimony of all the other witnesses, in order that, from the whole testimony, they may be able to determine, from the evidence itself, the matter upon which their opinion is desired, *Johnson* v. *State*, 10 Tex. App., 571, 577. But this holding appears to be unsound, especially in view of the fact, that medical experts are not required to give their conclusions upon the testimony of the other witnesses, since that would be to put them in the place of the jury, but that they are required to give their opinions upon hypothetical conditions of fact raised by the evidence.—*American Law Review.*

Trial: prejudicial remarks of the judge, having a tendency "to mislead the losing party":—In *Harrison* v. *Harrison*, 48 Kan, 443; *s. c.*, 29 Pac. Rep., 572, decided by the Supreme Court of Kansas, the syllabus is as follows: "Where, during the progress of a trial in the court, the judge informed the defendant, before he had introduced all of his evidence, that he did not think additional testimony would affect the decision but would hear anything of a different nature from that already offered, *held* that, under the facts and circumstances of this case, where the evidence preponderated largely in favor of the defendant, and the decision of the court was against him, the remarks of the court had a tendency to mislead the losing party, and prevent him from having a fair and impartial trial."—*American Law Review.*

Telegraph Companies: Non-delivery of messages—Injury to the feelings as an element of damages—Excessive verdict:—It is well-known that the rule in Texas is, that where a telegraphic message is sent,—we will say, to apprise the addressee of the serious illness or death of a near relative, and the delivery of it is negligently delayed (as often happens with such agents as telegraph companies can find in Texas), whereby the person addressed is prevented from being present at the dying bedside

of the relative, or from attending his funeral, the anguish of feeling thereby produced is properly considered by the jury in estimating the damages.—*American Law Review.*

Right of a man to destroy his own property:—In *Hague* v. *Wheeler*, 27 Atl. Rep., 714, three landowners had land resting about what seems to have been a common basin of natural gas. Two of them were able to utilize their gas and to find a market for it. The third was not so fortunate. He accordingly allowed his gas to flow and go to waste in the air. The others, feeling that this would produce a drain of the basin and in time render their wells valueless, sought an injunction to prevent him from leaving his well open. The injunction was denied, on the sage ground that a man has a right to destroy his own property and on the technical ground that a man's land extends to the centre of the earth, and that, within the lines of his terrestrial can of Chicago beef, he has a right to do what he pleases with it. The decision is grossly inequitable, and the reasons advanced by *Williams, J.*, in support of it do not deserve to be repeated. The fact that in carelessly or wantonly wasting and destroying his own, he was also, in all probability, wasting and destroying the property of his two neighbours, ought to have induced the court to enjoin him from doing it; and the soundest reasons, founded on justice and morality, could have been adduced in favor of the decision; and any system of law is disgraceful which does not reach the standard of justice and morality.—*American Law Review.*

Abuses of the right of argument:—* * *. A further result is that more crime is committed in a single county in the United States than in a whole kingdom on the continent of Europe. Still another result is that the number of homicides annually committed in the United States now exceeds five thousand, out of which number not one-twentieth of the perpetrators are capitally punished at the hands of the law, though more than one-tenth (including the innocent) are capitally punished at the hands of mobs. Such judicial decisions as the one last referred to are largely responsible for this state of things.—*American Law Review.*

Bicycles as "vehicles," "carriages:"—At Boulogne-sur-Mer a bicyclist was recently arrested on the charge of riding at night without a lantern, and was acquitted on the ground that a bicycle is not a carriage. At Bordeaux a bicyclist was arrested on a similar charge and fined, the prosecuting attorney proving to the court that a bicycle is a vehicle. In this connection it may be observed that bicycles were held to be

carriages within the provisions of the English Highway Act against furious driving, *Taylor* v. *Goodwin*, 4 Q. B. Div., 228; *Parkins* v. *Priest*, 7 *Id.*, 313, but not within a turnpipe act that imposed a toll on "carriages" impelled by steam or other agency, *Williams* v. *Ellis*, 5 *Id.*, 175.—*Criminal Law Magazine.*

Mr. Gladstone as a law student:—The *Law Gazette* (London), says:—But Lincoln's Inn has other memories of statesman. The younger Pitt was admitted as a student on 28th January, 1777; was called to the bar in Trinity term, 1780; was "invited to the bench" at Michaelmas term, 1782; and became treasurer of the society while prime minister in 1794. Canning, Mr. Gladstone's earliest political idol, entered himself as a student in 1787, but there is no trace of his having kept a single term, or of his having been called to the bar; but when he was premier he as a compliment was made a bencher. At the time of this somewhat quaint transaction the name of Benjamin Dissraeli—"D'Israeli the younger," as he then loved to call himself—was on the books of the Inn, he having been admitted on 18th November, 1824, and having kept seven terms, leaving the society, 25th November, 1831.

It has been noted that Mr. Gladstone kept twelve terms at Lincoln's Inn, and while no fewer than four members of his present cabinet (the Lord Chancellor, Mr. John Morley, Mr. Asquith, and Mr. Bryce) and both his principal law officers (Sir Charles Russell and Sir John Rigby) were called to bar by this "honorable society," it probably more interests the premier now to remember that Daniel O'Connell, in order to join the English Bar, was "eating his dinners" at Lincoln's Inn at the same time as himself.